FEB 6 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. ~~669~~

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,

Petitioner,

v.

WILBUR C. KING, *et al.*, as members of Florida Railroad and Public Utilities Commission, and CITY OF ST. PETERSBURG, FLORIDA, a municipal corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in this case on October 11, 1955.

The Opinion Below.

No opinion was written by the Supreme Court of Florida. Its judgment to which this petition is directed is appended at page 13. The judgment quashed a petition for writ of certiorari presented to that Court by this petitioner praying the Florida Court to review an order of the Florida Railroad and Public Utilities Commission, and the judgment dis-

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* Containing 12 pages, with an Appendix of 20 pages.

missed the proceeding in response to motions which submitted that our petition for certiorari "was prematurely filed" and that the order sought to be reviewed "does not possess the element of finality which is a prerequisite to judicial review".

The order of the Florida Commission is appended below at pages 14 to 27 on which latter page appears the mandate of the order by which petitioner is aggrieved.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1257(3), this petition presenting a right and immunity, which was specially set up and claimed before the Florida Commission as well as in the Supreme Court of Florida and is relied on here, under Article VI of the Constitution of the United States, the Fourteenth Amendment of the Constitution of the United States, and a decision of the United States (then) Circuit Court of Appeals for the Fifth Circuit in *City of St. Petersburg* v. *Atlantic Coast Line Railroad Company,* 132 F. 2d 675 (1943). The opinion in that case is appended at page 28.

The judgment of the Florida Supreme Court was entered October 11, 1955 (R. 1474; p. 13 *infra*). Rehearing was denied without opinion November 18, 1955. (R. 1483; p. 33 *infra.*)

Question Presented.

1. May a Supreme Court of a state properly permit an administrative agency of the state to render an order, compliance with which will result in the destruction of private property without compensation, particularly when the United States Court of Appeals for the Circuit in which the property lies has said no?

Statutory and Constitutional Provisions Involved.

28 U. S. Code, Sec. 1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, where the validity of a treaty or statute of United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Constitution, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .".

Constitution, Article VI, Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment XIV, Section 1:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law ...".

Statement of the Case.

The Florida Railroad and Public Utilities Commission entered an order on June 30, 1955 (R. 9; appended at pp. 14-27), which, so far as material here ordered Petitioner

> (1) "... to *remove* its St. Petersburg, Florida, freight and passenger depots from their present locations in said city and
>
> "[2] to *construct* and operate *new,* modern and adequate freight and passenger depots, capable of fully meeting the convenience and necessities of the public, at such location or locations in said city consistent with the public interest, safety and welfare, as may be determined and directed by this Commission pursuant to a further hearing to be held herein at a time and place subsequently to be announced by the Commission." (Emphasis added.)

Those two requirements are independent, and separable, as the order as a whole will also show; for the order finds that each of the depots and its related tracks are situated with respect to adjacent and intersecting city streets so that train movements serving the depots unreasonably interfere with vehicular traffic on such streets; that for the same reasons the depots are not reasonably accessible to persons desiring and entitled to use them; that the "locations" of the depots and their associated

tracks greatly retard the City's growth and expansion and depreciate the value of property in the vicinity of the depots and tracks; and orders that both depots "shall be relocated".

Each of the depots is of the type, design and construction (of brick, concrete, metal and wood) usually found in a city of 125,000 population. The ordered removal of the depots will result in their destruction. For that destruction, no provision is made by the Florida Commission's order or otherwise for compensation to petitioner.

In previous litigation, in the years 1936-1943, between the City of St. Petersburg and petitioner, the United States (then) Circuit Court of Appeals for the Fifth Circuit held, in *City of St. Petersburg* v. *Atlantic C. L. R. Co.*, 132 F. 2d 675, with respect to both depots and their associated and related tracks, that

> (1) "... destruction of the railroad properties so placed on that property may not be accomplished except by condemnation or other legal proceedings which allow just compensation for their taking."

and

(2) The City, for reasons given by the Court, was estopped to attempt destruction of those railroad properties.

Petition for rehearing was filed before the Florida Commission pursuant to its pertinent rule, and was denied. The Commission's rules make no provision for the filing of a second petition for rehearing. The Commission did not reserve jurisdiction to further consider the removal of the depots and the administrative process respecting such removal is at an end. The Florida Commission will hold a further hearing with respect, and only with respect, to the locations, design and costs of the depots.

Pursuing the method prescribed in the Florida practice for judicial review of final orders of the Florida Commission, petitioner applied to the Supreme Court of Florida for a writ of certiorari. The Florida Commission and the City of St. Petersburg separately filed identic motions to quash such petition and to dismiss the proceedings (R., pp. 1465 and 1469) and on October 11, 1955 the Florida Supreme Court granted the motions, quashed the petition for writ of certiorari and dismissed the proceedings. Petition for rehearing was seasonably filed (R. 1476) and was denied November 18, 1955 (R. 1483).

Presentation of Question Below.

The question submitted to this Court was presented to the Florida Railroad and Public Utilities Commission during the taking of testimony by it on three separate occasions:

(1) On cross examination of a witness for the City, he was asked by petitioner's counsel: ". . . Are you familiar at all with the case of the City of St. Petersburg *v.* Atlantic Coast Line that was decided January 7, 1943 and reported in 132 F. 2d 675 . . .?" (R. 310).

(2) In argument of an objection made by counsel for the City respecting two City ordinances considered in the cited case, counsel for petitioner, quoting from the opinion, stated the holding of the case with respect to the necessity of compensating petitioner, before "destruction of the railroad properties so placed on that property", the sites of the depots and tracks (R. 1024, 1025).

(3) In argument of an objection by the City's counsel, in which reference was made to petitioner's "counsel's repeated references to the case of City of

St. Petersburg *v.* Atlantic Coast Line Railroad Company, 132 F. 2d 675" (R. 1238, 1240).

The question was presented to the Supreme Court of Florida in Coast Line's petition for certiorari (R. 5) by paragraphs 3, 4, and 5, which read:

> "3. The destruction of the Petitioner's railroad properties which would result from the removal of the depots may not be accomplished except by condemnation or other legal proceedings which allow just compensation for their taking.
>
> "4. The Commission erred in failing to find that the City was estopped to urge the removal of either of the depots for the reasons stated in the case of *City of St. Petersburg* v. *Atlantic Coast Line Railroad Company,* 132 F. 2d 675, decided by the United States Court of Appeals for the Fifth Circuit on January 7, 1943.
>
> "5. The order of removal contravenes the Fourteenth Amendment of the Constitution of the United States, the Twelfth Section of the Declaration of Rights and Article XVI, Section 2 of the Constitution of the State of Florida, in that it takes the private property of the Petitioner without just compensation and deprives the Petitioner of its property without due process of law."

Reasons for Granting the Writ.

The following holding of *Matlow* v. *Missouri,* 295 U. S. 97, 98 (1935) seems to support the propriety of this application:

> "In view of the contention that the State Court had denied effect to a judgment of the United States District Court . . . writs of certiorari were granted".

The Supreme Court of Florida, by its refusal to entertain petitioner's petition for certiorari presented to that Court, has left in force and effect an order of the Florida Railroad and Public Utilities Commission which ignores and directly conflicts with the judgment and opinion of the then United States Circuit Court of Appeals for the Fifth Circuit in the case of *City of St. Petersburg* v. *Atlantic C. L. R. Co.*, 132 F. 2d 675. The order cannot be obeyed without denying effect to that judgment and opinion.

The Florida Commission's order is definitive and final so far as the removal and inevitable concomitant destruction of the depots is concerned. That aspect of the order is subject "to no further review or correction in any other state tribunal". *Market Street R. Co.* v. *Railroad Comm. of California*, 324 U. S. 548, 551 (1945). The Florida Commission has reserved no jurisdiction with respect to the removal of the depots which it has ordered. The administrative process before the Commission in all aspects relating to or concerning removal of the depots is at an end; that portion of the order requiring the removal of the depots is now as final as it will be after the Commission holds its "further hearing" to consider the location and characteristics of the new depots.

There is no connection between the provisions of the order requiring removal of the depots and the provisions of the order relating to the new depots. The direction to "construct" new depots is entirely apart from, and is not a consequence of compliance with, the direction to "remove" the present depots from their present sites. The construction of the new depots is not to wait upon the removal of the old. There is no room for a reasonable supposition that maybe the new depots are not to be constructed until the old are removed or that the land occupied by the present

ones may be needed for those to be constructed. The record as a whole, accurately reflected by the Commission's order (*post*, p. 27), shows beyond all peradventure that the City's purpose, its expressed desire, and the reason for the litigation, is to force petitioner, its depots, tracks and all its railroad facilities out of the down town area of St. Petersburg. The City's petition to the Florida Commission (R. 18) complains throughout of the "location of said depots", and the petition prayed that it be considered as a formal complaint as to the "location" as well as adequacy of the depots. The Commission's order, in accord, finds that both depots "should be relocated" (*post*, p. 27).

Under the Florida law, "valid administrative orders of the railroad commissioners should be obeyed, and those who are subject to such orders violate them at their peril". *State* v. *Florida E. C. Ry. Co.*, 58 Fla. 524, 50 So. 425 (1909). One peril is that a railroad guilty either of a "violation" or of a "disregard" of an order of the Commission is amenable to a penalty of "not more than $5,000". Sec. 350.28, Fla. Stat. 1943.

It does seem, and we submit, that we have here by the Florida Supreme Court one of those orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review . nd too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949); *Stack* v. *Boyle*, 342 U. S. 1 (1951); *Swift & Co.* v. *Compania Caribe*, 339 U. S. 684 (1950); *Roberts* v. *United States District Court*, 339 U. S. 844 (1950). Traditionally this Court has given such situations a "practical rather than a technical construction". *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949).

Moreover, this Court applies its own standards as to the characteristic of finality in a judgment of a state court which will justify the entertaining by this Court of an appeal or application for certiorari. "Local rules of practice" do not furnish the test. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). *Market Street R. Co.* v. *Railroad Comm. of California*, 324 U. S. 548, 551 (1945), where it is said: "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment". The Court said in *Dickenson* v. *Petroleum Conv. Corpn.*, 338 U. S. 507 (1949), that the matter of "the finality of a judgment for purposes of appeal" is "a subject on which the volume of judicial reading already is formidable". But in our case, as in *Dickenson*, the order of the Florida Commission for the removal of the depots and the Florida Supreme Court's refusal to interfere with it, "was not tentative, informal nor incomplete". On the contrary, so far as the removal of the depots is concerned, "the case was concluded and closed" when the Supreme Court of Florida declined to interfere.

Trustees v. *Greenough*, 15 Otto 527 (1882), indicates that the order for the removal of the depots is *pro tanto* a final one, possessing, as it does, in that regard the same characteristics of finality as did the judgment for costs out of a fund *in custodia legis* involved in *Greenough*.

Under the doctrine of *Carondolet Canal and Nav. Co.* v. *Louisiana*, 233 U. S. 362, 371 (1914) (where the judgment appealed from was reviewed by this Court, though it left for later determination the title to a parcel of land not appurtenant to the larger property disposed of by the judgment, and left also for later determination the matter

of an accounting), the judgment of the Florida Supreme Court, so far as it affects removal of the depots "has a substantial finality" as well as formal finality; for the questions reserved by the Florida Commission's order, viz., the location, design and cost of new depots, are the only questions to which "the further proceedings are directed to apply"; and there is "distinct and explicit finality" to the mandate that the existing depots be removed.

Hill v. *Chicago and E. R. Co.*, 140 U. S. 52, 54 (1891), would seem to justify the issuance of the writ, inasmuch as the adjudication requiring removal of Coast Line's depots is "a severable matter from the other subjects of controversy, and did not affect their determination. . . All the merits of controversy [here, respecting the removal of the depots]... were disposed of, and could not be again reopened, except on appeal..."— which appeal the Supreme Court of Florida has refused to entertain. As the opinion in *Hill* also says: "The decree of June 8, 1885 was appealable as to the matters it fully determined; so also was the decree of July 14, 1887 as to the severable matter which it involved".

Conclusion.

A national court having held in *City of St. Petersburg* v. *Atlantic C. L. R. Co.*, 132 F. 2d 675 (1943), that the destruction of the depots and their tracks may not be accomplished except by condemnation or other legal proceedings which allow just compensation for their taking; and the order of the Florida Commission plainly providing for such destruction without any compensation; and the Supreme Court of Florida declining to interfere because forsooth in its view the Florida Commission's order is not final under

the Florida practice: it is suggested that this Court well might say now instead of later that it will not permit a judgment and opinion of a court of the nation to be so ignored.

Respectfully submitted,

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